No. 85-682

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

GERALD D. BAIR, DIRECTOR OF THE DEPARTMENT OF REVENUE OF IOWA,

Petitioner,

vs.

TRAILER TRAIN COMPANY, RAILBOX COMPANY, AND RAILGON COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a federal district court has jurisdiction to enjoin a State non-property tax that it finds to be in violation of the 4-R Act (49 U.S.C. § 11503).

   A. Whether the jurisdictional bar of the Tax Injunction Act can be overridden in a particular case by another federal statute which does not by its explicit terms authorize federal court injunctive relief in that case.

   B. Whether the 4-R Act, which authorizes federal court injunctive relief only where there is a suitably large disparity in property value assessment, authorizes federal injunctive relief against a non-property State tax.

II. Whether the Court of Appeals erred in holding that Plaintiffs, who are themselves not common carriers by railroad, can invoke the protection of the 4-R Act.

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GERALD D. BAIR, DIRECTOR OF THE DEPARTMENT OF REVENUE OF IOWA,

Petitioner,

vs.

TRAILER TRAIN COMPANY, RAILBOX COMPANY, AND RAILGON COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported as *Trailer Train Company, Railbox Company and Railgon Company v. Bair,* 765 F.2d 744 (8th Cir. 1985). Appendix B.

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit was entered on June 25, 1985. A timely Petition for Rehearing was denied by that Court on August 2, 1985. This Petition for a Writ of Certiorari was filed within ninety (90) days of that date. Accordingly, this Petition is timely under 28 U.S.C. § 2101 (c) and Supreme Court Rule 20. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

———o———

STATUTORY PROVISIONS INVOLVED

This case involves the anti-tax discrimination provisions of section 306 (1) (d) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 ("4-R Act") contained in 49 U.S.C. § 11503 (b) (4). This section reads:

> (1) [A]ny action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:
>
> • • •
>
> (d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

In addition, this case involves section 306 (2) (c) of the 4-R Act, which provides that:

> Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district court of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments which may be necessary to perfect, restrain, or terminate any acts in violation of this section, except that —
>
> • • •
>
> (c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 percentum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction.

The remaining federal statute involved in this case is the Tax Injunction Act, 28 U.S.C. § 1341:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law, where a plain, speedy and efficient remedy may be had in the courts of such State.

The State tax invalidated by the district court is the Iowa Railway Mileage Tax, codified as Iowa Code Chapter 435. Because of the length of this statute, it is set out verbatim in Appendix C.

STATEMENT OF THE CASE

Respondents are companies engaged in the business of furnishing fleets of standardized railroad cars to common carriers by railroad. The cars are furnished to common carriers by railroad for use in interstate commerce and are subject to the jurisdiction of the interstate commerce commission. The companies themselves, however, are not common carriers by railroad.

Respondents are all subject to the Iowa Railway Mileage Tax, defined in Chapter 435 of the Iowa Code. This tax is levied at a rate of one and one-fourth cents per loaded mile and applies to all loaded mileage travelled in or through the State of Iowa by freight line and equipment cars during a given calendar year.

Petitioner is the Director of the Department of Revenue of the State of Iowa. He is in charge of the assessment and collection of this tax.

Respondents challenged this tax in the United States District Court for the Southern District of Iowa, alleging that section 306 of the 4-R Act invalidated the tax. Jurisdiction in the district court was based on 28 U.S.C. § 1337 (civil action arising under an Act of Congress regulating commerce) and 28 U.S.C. § 1331 (federal question jurisdiction).

Petitioner argued in response that section 306 did not apply to non-property taxes, and that, in any event, Respondents could not assert the protection of this statute. The district court rejected these arguments and granted Respondents' Motion for Summary Judgment. Appendix A.

This decision was affirmed on appeal to the United States Court of Appeals for the Eighth Circuit. Appendix B. At oral argument before the Eighth Circuit, Petitioner argued that the Tax Injunction Act, 28 U.S.C. § 1341, divested the district court of jurisdiction to enjoin enforcement of the tax. This jurisdictional argument was not addressed in the Eighth Circuit decision affirming the district court. The jurisdictional argument was raised again in a timely Petition for Rehearing, but that Petition was denied.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

A. This Court should review this case to determine the circumstances under which an act of Congress can override the Tax Injunction Act.

The Tax Injunction Act, 28 U.S.C. § 1341, has as its "principal purpose" to "limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *California v. Grace Brethren Church*, 457 U.S. 393, 408-09 (1983); *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 522 (1981). This statute codifies principles of comity which themselves stand as a jurisdictional bar to the granting of injunctive relief against a State tax. *Fair Assessment In Real Estate Association, Inc. v. McNary*, 454 U.S. 100 (1981).

Alhough it is certainly within the perogative of Congress to pass legislation allowing, in a specific case, a district court to enjoin the operation of a State statute, this

should, in light of the compelling State concerns mentioned previously, be found only when a clear intent to do so is expressed in the legislation. *Cf. Grace Brethren Church,* 457 U.S. at 413 (exceptions to the Tax Injunction Act should be narrowly construed). This position is consistent with this Court's requirement that Congress enact a "clear statement" of its intent when a congressional enactment impinges on traditional State authority. *See United States v. Bass,* 404 U.S. 336, 349 (1971); *Rewis v. United States,* 401 U.S. 808, 812 (1971); *United States v. Five Gambling Devices,* 346 U.S. 441, 449 (1953).

Section 306(2) authorizes injunctive relief "[n]otwithstanding any provision of section 1341" but then, significantly, goes on to provide that "no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 percentum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction". It is only by completely ignoring this provision that section 306 can be held to override the Tax Injunction Act. Such expansive construction of this statute, or any statute which purports to override the Tax Injunctive Act, threatens the vitality of that Act and threatens, as well, the very foundation of federalism which motivates, and is codified in, section 1341. Therefore, it is only where an act of Congress clearly and explicitly, by its own terms, authorizes an injunction against a State tax that a federal court obtains jurisdiction to order such relief.

B. If unreviewed, the expansive construction of § 306(2) by the Eighth Circuit, will severely impair the ability of the States to administer their own tax systems without unnecessary federal interference.

As the Eighth Circuit noted, the Courts have held that the 4-R Act does apply to non-property taxes. This is so notwithstanding the overwhelming property tax context of that statute. However, the mere applicability of this statute to non-property taxes does not, in and of itself, authorize federal judicial injunctions against such taxes. The relief provision of § 306 explicitly contemplates that, even for property taxes, there will be circumstances under which a federal district court has no jurisdiction to order injunctive relief. This does not mean that complaining taxpayers are deprived of a remedy; it simply means they are deprived of a remedy in federal court. The availability of a state court remedy fully protects whatever rights taxpayers may have under § 306. *Grace Brethren Church*, 457 U.S. at 417 n. 27.

Exceptions to the Tax Injunction Act must be narrowly construed. *Grace Brethren Church*, 457 U.S. at 413. In particular, the provision of section 306 authorizing federal injunctive relief must be narrowly construed. This conclusion has already been reached by federal courts in this jurisdiction; see *Burlington Northern Railroad Company v. Bair*, 584 F.Supp. 1229, 1232 (S.D. Iowa 1984), *affirmed in part and remanded in part on other grounds*, 766 F.2d 1222 (8th Cir. 1985). Invocation of section 306 (2) to authorize judicial relief in cases of non-property taxes, is the direct antithesis of narrow construction of that statute. In fact, this construction extends section 306 (2) to

cover situations to which the statute itself, by its own explicit language, does not apply.

An interpretation of the reach of the 4-R Act by this Court is necessary because an expansive reading of this statute by lower courts threatens the revenue systems of many states. If the statute is held to authorize federal injunctive relief in cases of non-property taxes, the tax structure of many states will be impaired. Reasonable state excise taxes traditionally imposed on rail carriers, such as income, sales and use, business license and gross receipts taxes, are potentially endangered. These taxes provide vital sources of revenue which allow states to assume their responsibility of providing citizens with needed services.

C. This Court should review this case to resolve a conflict among the federal courts as to whether companies which are not themselves common carriers by railroad can invoke the protection of the 4-R Act.

In *Trailer Train Co. v. State Board of Equalization*, 538 F.Supp. 509, 513 (N.D. Cal. 1982) the federal district court for the Northern District of California held that the statutory prohibition of discriminatory treatment of a common carrier by railroad did not apply to companies which, like the Plaintiffs in this case, were not common carriers by railroad. This conclusion, however, was rejected by the Eighth Circuit Court of Appeals in *Trailer Train Co. v. State Board of Equalization*, 710 F.2d 468, 471 (8th Cir. 1983), and rejected again in the case from which review is now sought.

This issue is, thus, one on which the lower federal courts are split. In addition, this issue is one of consider-

able importance to the ability of the states to effectively administer their tax systems.

It has already been observed that an expansive reading of the 4-R Act threatens the sovereign power of the states to run their own tax systems. The holdings of the Eighth Circuit extend the scope of the 4-R Act beyond all existing precedent and yield anamalous results. If a business entity can claim the protection of the 4-R Act merely because an increased cost of consumption deriving from a state tax "results" in discriminatory treatment against a common carrier by railroad, then, for example, a manufacturer of railroad seat covers could legitimately invoke the 4-R Act, as could a person who sells uniforms for train conductors.

The clear language of the statute also supports Petitioner's position. The statute does not refer to non-rail carriers at all, except for reference to "transportation property", a term which is explicitly defined by the statute itself and used in subsections (a) through (c) of section 306, but not subsection (d) of that section. Thus, where Congress wanted to extend the applicability of section 306 beyond railroads themselves, it made clear its' intent to do so. In subsection (d), Congress explicitly shifted the emphasis of the statute from owners of rail property to "common carriers by railroad". It is only by reading beyond the clear language of the statute that subsection (d) can be interpreted so as to apply to Respondents. It is ironic that Respondents, who have consistently argued that the statute is clear and should be literally applied, now seek a judicial interpretation of the statute that goes beyond its literal language.

In conclusion, this Court should review the decision of the Eighth Circuit to revolve a conflict between lower federal courts, and to limit the scope of the 4-R Act to that which was intended by Congress.

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CONCLUSION

For these reasons a Writ of Certiorari should issue to review the opinion of the United States Court of Appeals for the Eighth Circuit.

Respectively submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NO. 83-528-A

TRAILER TRAIN COMPANY, RAILBOX COMPANY and RAILGON COMPANY,

Plaintiffs,

vs.

GERALD D. BAIR, Director of the Department of Revenue of Iowa,

Defendant.

———o———

ORDER FOR JUDGMENT

(Filed November 21, 1984)

This is an action for declaratory and injunctive relief against the collection of Iowa Railway Mileage Taxes from Plaintiffs, Trailer Train Company ("Trailer Train"), Railbox Company ("Railbox") and Railgon Company ("Railgon"), referred to collectively herein as the "Companies." The Companies contend that the Iowa Railway Mileage Tax is unlawful under Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, now codified at 49 U.S.C. § 11503 and referred to herein as "Section 306".

This case is before the Court on cross-motions for summary judgment. The Companies seek a judgment de-

claring the Railway Mileage Tax unlawful under Section 06(1)(d) and enjoining its collection. Defendant, hereinafter referred to as the "Director," seeks a judgment dismissing the Companies' complaint solely on the legal ground that this Court is without jurisdiction under Section 306 to invalidate discriminatory state taxes other than property taxes and that the Companies, because they are not common carriers by railroad, are not entitled to the protections of Section 306(1)(d).

Based upon the parties' stipulation, the parties' papers filed pursuant to rule 2.2.7 of the rules of this Court, and upon the statements of counsel, this Court concludes that there is no dispute among the parties with respect to the following material facts:

FACTS

a. The Companies

13. The Companies are engaged in the business of furnishing fleets of standardized railroad cars to common carriers by railroad.

2. The Companies' cars are furnished to common carriers by railroad for use in interstate commerce and are subject to the jurisdiction of the Interstate Commerce Commission ("ICC"). The Companies themselves are not common carriers by railroad.

3. The Companies' cars have been defined by the ICC as "transportation property" within the meaning of Section 306(3)(d). *See* ICC Docket No. 36873 (Jan. 10, 1979).

4. Trailer Train and Railbox both operate under a car pooling arrangement approved by the ICC in the

Report and Order of the Interstate Commerce Commission in American Railbox Company and Trailer Train Company — Petition for Approval of the Pooling of Car Service With Respect to Boxcars, Finance Docket No. 27589 (August 1, 1974) and in *Trailer Train Company, et al — Petition for Approval of the Pooling of Car Service With Respect to Flatcars, Finance Docket No. 27590 (August 4, 1974)*, 347 I.C.C. 862 (1974) (hereinafter cited as "ICC Report"). Railgon operates under a car pooling arrangement similar to the ICC Report.

5. As noted in the ICC Report, Trailer Train was formed by thirty-two operating railroads, each of which was a shareholder in Trailer Train and each of which was a guarantor of certain of Trailer Train's debt obligations. Railbox and Railgon are wholly-owned subsidiaries of Trailer Train.

6. The Companies acquire railroad cars by lease or purchase and furnish such cars to railroads operating in Iowa (and elsewhere) pursuant to car-service contracts.

7. Under such car-service contracts (the basic terms of which were approved by the ICC in the ICC Report), the Companies agree to provide sufficient numbers of cars to meet the railroads' demands in exchange for the railroads' payment to the Companies of a per diem charge (and, for some cars, an additional per mile charge) for the use of each car furnished. The Companies retain responsibility for the routine maintenance of all cars in their pool. All state taxes are paid by the Companies as an expense of operation.

8. The Companies are the agents through which common carriers by railroad fulfill their obligations under the

Interstate Commerce Act to provide adequate car service. In effect, the Companies are the instrumentalities by which common carriers meet car service requirements and furnish transportation service to the public. As stated in the ICC Report:

> It is our [the ICC's] conclusion that, at the present time, a carrier-owned car company which owns (or leases) and maintains a fleet of cars to be leased to participating railroads constitutes an agent through which the participating railroads may perform a portion of their transportation operations while retaining their individual obligations under the act [i.e., § 1(11) of the Interstate Commerce Act, 49 U.S.C. § 11121], and that the creation of such an exclusive agent, which has neither the powers nor responsibilities of a common carrier as these remain with the individual participating railroads, constitutes a means by which services, equipment and revenue may be pooled under section 5(1) of the act. The pooling arrangements herein closely conform with this requisite pattern in that the participating railroads do not intend to avoid their obligations under the act to provide adequate car service but will merely employ either Trailer Train or Railbox or both as instrumentalities through which such responsibilities may be performed; *the pool cars, though owned, maintained, and partially directed by Trailer Train and Railbox, are entirely under the control of the individual railroads while on their lines, the actual transportation function is performed by the participating railroads themselves; and the Trailer Train and Railbox merely constitute agents whereby the railroads may jointly perform specific transportation functions.* [Emphasis added].

ICC Report, pp. 879-80.

9. By contracting with the Companies for car service, common carriers by railroad obtain access to a larger

fleet of cars without expending substantial amounts of cash or incurring long-term debt. Railroads that are owners of Trailer Train also (1) share the cost of ownership, operation and maintenance of their cars; (2) transfer to the Companies the burden of managing, controlling and accounting for vast numbers of cars; (3) obtain sufficient numbers of standardized cars for their railroad operations; (4) obtain favorable financing for rail cars through Trailer Train and (5) share in car research and development information.

10. The Companies have no property permanently located in Iowa, and their sole relationship to the State of Iowa arises by reason of the location of, or operation of, railroad cars through or in the State of Iowa by railroads pursuant to the agreements described above. The Companies have no offices, facilities, employees or other such nexus with the State of Iowa.

b. Section 306

11. Enacted in 1976, Section 306 expressly declares that discriminatory state taxation of railroads constitutes an unreasonable and unjust discrimination against, and an undue burden upon, interstate commerce. Sections 306(1)(a), (b) and (c) provide that a state, a subdivision of a state, or any authority acting for a state or a subdivision of a state, may not assess, levy or collect discriminatory ad valorem taxes upon rail transportation property. Section 306(1)(d), which is the focus of this litigation, provides that a state, subdivision of a state, or any authority acting for a state or a subdivision of a state,

may not impose "any other tax which results in discriminatory treatment of a common carrier by railroad."[1]

c. Railway Mileage Tax

12. For many years prior to 1978, the State of Iowa imposed an ad valorem tax upon the cars of "freight-line" and "equipment companies" operating within the State of Iowa. "Freight-line" and "equipment companies" were defined to be companies engaged in the business of furnishing or leasing cars to be used in the operation of any rail line within the state (except for companies that owned, leased or operated the rail line on which such cars were operated, or companies that otherwise listed their property for taxation). Prior to 1978, Trailer Train and Railbox paid this ad valorem tax. (Railgon did not exist prior to 1978). For the last year in which an ad valorem tax was imposed upon freight-line and equipment companies, Trailer Train's ad valorem tax liability to the State of Iowa was $30,719.00.

13. In 1978, the ad valorem tax imposed on Companies was repealed by Acts 1978 (67 G.A.) Chapt. 1149, § 13, effective July 7, 1978.

14. The ad valorem tax on freight-line and equipment companies was replaced by a "Railway Mileage Tax," imposed under Chapter 435, Code of Iowa, §§ 435.1 through 435.8.

15. The Railway Mileage Tax is imposed on the loaded mileage of "freight-line and equipment car companies,"

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[1] The quoted language is from Section 306 as enacted, Pub. L. No. 94-210, 90 Stat. 54 (Feb. 5, 1976); *See Atchison, Topeka & Santa Fe Ry. v. Bair*, 535 F. Supp. 68, 71 (S.D. Iowa, 1982).

which are defined by §435.1, Code of Iowa, as companies that operate, furnish or lease railroad cars to be used in the operation of any railway line located within the State of Iowa. The Railway Mileage Tax is levied at a rate of one and one-fourth cents per loaded mile and applies to all loaded mileage traveled in or through Iowa by freight line and equipment cars during a given calendar year. Chapter 435, Code of Iowa.

16. The Director claims Railway Mileage Taxes against the Companies for the years 1978 through 1982, as follows:

Base Year	Trailer Train	Railbox	Railgon
1978	$1,013,005.15	$46,836.49	———
1979	921,728.09	61,039.26	———
1980	813,316.44	52,897.91	$ 811.38
1981	794,087.26	29,405.40	4,011.23
1982	860,546.73	19,364.38	1,391.40

17. Counsel for the Director admitted in open court that the Railway Mileage Tax results in discriminatory treatment of these Companies as compared with all other commercial and industrial taxpayers in the State of Iowa.

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CONCLUSIONS OF LAW

This case turns upon two questions of law raised by the Director: (1) whether this Court has jurisdiction under Section 306 to prohibit the state from imposing discriminatory non-property taxes upon owners of rail transportation property, and (2) whether the Companies are

entitled to the protections of Section 306(1)(d) even though they are not "common carriers by railroad".

1. By its terms, Section 306 prohibits *all* forms of state taxation that result in discriminatory treatment of common carriers by railroad. Sections 306(1)(a), (b) and (c) forbid discriminatory state taxation of rail transportation property; Section 306(1)(d) forbids the imposition by a state of "*any other tax* which results in discriminatory treatment of a common carrier by railroad."

Notwithstanding the recent decision in *Richmond, Frederick & Potomac R.R. v. Dept. of Taxation*, 591 F. Supp. 209 (E.D. Va. 1984), this Court will not depart from its prior ruling in *Atchison, Topeka & Santa Fe v. Bair*, 535 F. Supp. 68, 71 (S.D. Iowa 1982), that Section 306(1)(d) means precisely what it says, i.e. that Section 306(1)(d) encompasses and prohibits discriminatory nonproperty taxes as well as discriminatory property taxes. This Court believes that *Alabama Great Southern Ry. v. Eagerton*, 663 F.2d 1036 (11th Cir. 1981) and its progeny [e.g. *Atchison, Topeka & Santa Fe Ry. v. Bair*, 338 N.W.2d 338 (Iowa 1983) *cert. denied*, 104 S.Ct. 1427 (1984), and *Kansas City Southern v. McNamara*, 563 F. Supp. 199 (M.D. La. 1983)] were correctly decided. Furthermore, this Court believes that the *Eagerton* line of decisions is consistent with Congress' prupose in enacting Section 306 which, as described in *Ogilvie v. State Board of Equalization*, 492 F.2d 446, 454-55 (D.N.D. 1980) *aff'd*, 657 F.2d 204, 210 (8th Cir. 1981), was to prohibit tax discrimination in any form whatsoever. Therefore, this Court holds that it has jurisdiction under Section 306 to entertain an attack upon nonproperty taxes which result in discriminatory treatment of common carriers by railroad.

2. Although the Companies are not "common carriers by railroad" as that phrase is used in Section 306(1)(d), they nevertheless are entitled to the protections of Section 306(1)(d). Because of the Companies' close relationship with common carriers by railroad—the Companies are owned by major railroads and are the agents through which the railroads fulfill many of their car service obligations—a state tax that discriminates against the Companies "*results* in discriminatory treatment of a common carrier by railroad" within the meaning of Section 306(1)(d). *Trailer Train Company v. State Board of Equalization*, 710 F.2d 468 (8th Cir., 1983). This Court holds, therefore, that the Companies are protected under Section 306(1)(d) to the same extent as common carriers by rail and that they may attack *any* discriminatory state tax that is imposed upon them.

3. Since this Court has jurisdiction of the Companies' claim under Section 306 and the Director has conceded on the record the discriminatory nature of the Railway Mileage Tax as it is applied to these Companies, this Court concludes that the Railway Mileage Tax is unlawful under Section 306(1)(d) and that the Director, and all those in active concert or participation which him, should be permanently enjoined from assessing, levying or collecting Railway Mileage Taxes from the Companies for the 1978 base year forward. *See, Alabama Great Southern Ry. v. Eagerton*, 541 F. Supp. 1084, 1087 (M.D. Ala. 1982).

ORDER

Plaintiffs' motion for summary judgment is granted. Defendant's countermotion for summary judgment is denied.

Defendant, Gerald D. Bair, Director of the Department of Revenue of Iowa, his successors in office, and all those in active concert or participation with them, are hereby permanently enjoined and restrained from levying, assessing or collecting Railway Mileage taxes from the plaintiffs herein for the 1978 base year and for each base year thereafter.

Each party will bear its own costs.

ENTERED this 21st day of November, 1984.

/s/ WILLIAM C. STUART, JR,
Chief Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-2583

Trailer Train Company, Railbox Company and Railgon Company,

Appellees,

v.

Gerald D. Bair, Director of the Department of Revenue of Iowa,

Appellant.

Appeal from the United States District Court for the Southern District of Iowa.

Submitted: May 16, 1985

Filed: June 25, 1985

Before LAY, Chief Judge, BOWMAN, Circuit Judge, and DEVITT,* District Judge.

LAY, Chief Judge.

The Director of the Department of Revenue for the State of Iowa appeals from a ruling of the district court, Honorable William C. Stuart. The case arises under section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 54 (codified at 49 U.S.C. § 11503).

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* The HONORABLE EDWARD J. DEVITT, Senior United States District Judge for the District of Minnesota, sitting by designation.

Plaintiffs are companies engaged in the business of furnishing fleets of standardized railroad cars to common carriers by railroad. These railroad cars are considered "transportation property" by the ICC. *See* ICC Docket No. 36873 (Dec. 13, 1978). Under Iowa Code § 435, a "railway mileage tax" is imposed on plaintiffs on the basis of the number of miles their loaded cars travel in or through the state. The Director admits the tax is discriminatory. However, the Director contends plaintiffs are not entitled to protection under section 306 because: (1) they are not common carriers by railroad; and (2) section 306 does not apply to non-property taxes.[1]

The Director's first contention has already been considered and rejected by this court in a previous case. *Trailer Train Co. v. State Board of Equalization*, 710 F.2d 468, 471-73 (8th Cir. 1983). Even if we were inclined to disagree with *Trailer Train*—which we are not—only the court en banc can overrule prior circuit precedent. The district court did not err in finding section 306 protects plaintiffs even though they are not common carriers by railroad.

The Director's second argument runs contrary to all precedent. We have stated that section 306 was intended to prevent tax discrimination "in any form whatsoever." *Ogilvie v. State Board of Equalization*, 657 F.2d 204, 210 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981). The Director admits Iowa's railway mileage tax results in discrim-

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[1]We note the Director has made the opposite argument to this court in *Burlington Northern v. Bair*, No. 85-1410 (8th Cir. 1985), contending § 306(1)(d) applies only to taxes other than property taxes.

ination. Contrary to the Director's argument, we have already indicated that section 306(1)(d)[2] is "applicable to all forms of state taxation rather than just property taxation." *Trailer Train,* 710 F.2d at 472 n.6. Other courts have reached the same conclusion. *Alabama Great Southern Railroad v. Eagerton,* 663 F.2d 1036 (11th Cir. 1981); *Kansas City Southern Railway v. McNamara,* 563 F. Supp. 199, 200 (M.D. La. 1983); *Atchison, Topeka & Santa Fe Railroad v. Bair,* 535 F. Supp. 68, 70-71 (S.D. Iowa 1982); *Atchison, Topeka & Santa Fe v. Bair,* 338 N.W.2d 338, 344-46 (Iowa 1983), *cert. denied,* — U.S. —, 104 S.Ct. 1427 (1984).

The Director relies on *Richmond, Fredericksburg & Potomac Railroad v. Department of Taxation,* 591 F. Supp. 209 (E.D. Va. 1984), which used legislative history to create ambiguity in section 306(1)(d) and conclude that Congress intended to limit its effect to property taxes. However, the Fourth Circuit has recently overruled *Richmond* to the extent it held that section 306(1)(d) does not apply to non-property taxes. *Richmond, Fredericksburg & Potomac Railroad v. Department of Taxation,* No. 84-1774 (4th Cir. 1985). The Fourth Circuit affirmed the judgment in favor of the Commonwealth of Virginia only on the ground that there was no discrimination.

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[2] § 306(1) * * * It is unlawful for a State, a poliaical subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

* * *

(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

Finding no merit to the arguments of the Director, we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

§ 435.1, RAILWAY MILEAGE TAX

CHAPTER 435

RAILWAY MILEAGE TAX

Referred to in § 427.1(35), 441.47

435.1	Definitions.	435.6	Determination of tax due—limitation.
435.2	Tax imposed.	435.7	Refunds.
435.3	Returns.	435.8	Statutes applicable to tax.
435.4	Payment of tax.	435.9	Credit of tax to special fund.
435.5	Penalty.		

435.1 Definitions.

As used in this chapter unless the context otherwise requires:

1. *"Car company"* means freight line and equipment car companies.

2. *"Company"* means a sole proprietorship, partnership, limited partnership, corporation or other business entity.

3. *"Freight line company"* means a company engaged in the business of operating cars not otherwise listed for taxation or taxed in this state for the transportation of freight over any railway line located within this state, if such line is not owned, leased or operated by such company.

4. *"Equipment car company"* means every company engaged in the business of furnishing or leasing cars to be used in the operation of any railway line located within

this state, if such line is not owned, leased or operated by such company and the cars are not otherwise listed for taxation in this state.

5. *"Car"* means all railroad cars whether termed box, flat, coal, ore, tank, gondola, refrigerator or another name.

6. *"Director"* means the director of revenue.

7. *"Department"* means the department of revenue.

8. *"Railway"* means companies subject to taxation under chapter 434.

9. *"Miles"* or *"mileage"* means loaded miles of each railroad car whether in intrastate or in interstate commerce traveled in or through the state.

10. *"Base year"* means the calendar year immediately preceding the year in which the tax return is required to be filed under this chapter.

[C79, 81, § 435.1]

435.2 Tax imposed.

A tax is hereby imposed on the mileage of freight line and equipment car companies at a rate of one and one-fourth cent per mile and shall apply to all mileage traveled in or through this state during the base year. The cars of the car companies subject to this tax shall not be subject to a property tax, nor shall the rental of such cars be subject to any sales or use tax.

[C79, 81, § 435.2]

Referred to in § 435.8, 435.9

435.3 Returns.

Each car company subject to taxation under this chapter shall annually file a return on or before the first Monday in June. The return shall include a true and accurate statement of the miles traveled in or through this state during the base year on railway lines not owned or operated by the car company. The return shall also include the following:

1. The name of the car company.

2. The nature of the company and its business.

3. The address of the individual to be contacted concerning the return.

4. The railroad company for which the Iowa miles were traveled.

5. An attestation as to the accuracy of the return.

[C79, 81, § 435.3]

Referred to in § 435.4

435.4 Payment of tax.

The tax due shall be paid in full and shall accompany the return required to be filed by section 435.3. If payment does not accompany the return or payment is not in the amount shown due and payable on the return, the company is subject to interest at the rate in effect under section 421.7 for each month or fraction thereof on the balance due.

[C79, 81, § 435.4; 81 Acts, ch 131, § 12]

435.5 Penalty.

If any person fails to remit at least ninety percent of the tax due with the filing of the return on or before the due date, or pays less than ninety percent of the total

amount of the tax due as shown on the return, there shall be added to the tax a penalty of five percent of the tax due. In case of willful failure to file a return with intent to evade tax, or in case of willfully filing a false return with intent to evade tax, in lieu of the penalty above provided, there shall be added to the amount required to be shown as tax on the return fifty percent of the amount of the tax. The penalty imposed under this section is not subject to waiver.

[C79, 81, § 435.5; 82 Acts, ch 1180, § 6,8]
84 Acts, ch 1173, § 8, 10

Referred to in § 435.6

1984 amendment effective January 1, 1985 for taxes due and payable on or after that date. 84 Acts. ch 1173, § 10

435.6 Determination of tax due—limitation.

The department has three years from the time the return was filed or after the return became due, including any extensions of time for filing, whichever time is the later, to audit the return and determine its accuracy. If it is shown by the audit that additional tax is due, interest at the rate in effect under section 421.7 for each month or fraction thereof shall be added to the additional tax shown to be due.

The period for determination of tax due shall be unlimited in the case of a false or fraudulent return with intent to evade tax or in the case of failure to file a return.

If the tax due is greater than the amount paid, the department shall compute the amount due, together with interest and penalties as provided in section 435.5, and shall notify the taxpayer by certified mail of the total if

paid on or before the last day of the month in which the notice is postmarked.

If it is shown that an overpayment was made, interest at the rate in effect under section 421.7 for each month or fraction thereof shall be added to the overpayment with interest commencing sixty days after the date of payment.

The railway companies, submitting mileage pertaining to the car companies subject to the tax imposed by this chapter, shall make available, at the department's request, their books or records to ascertain the correct mileage.

Car companies submitting returns under this chapter shall also make available at the department's request, their books or records to ascertain the correct mileage.

[C79, 81, § 435.6; 81 Acts, ch 131, § 13, 14]

Referred to in § 435.7

435.7 Refunds.

If any tax, penalty or interest has been paid which was not due under the provisions of this chapter, then such amount plus any interest imposed as a result of section 435.6 shall be credited against any tax due or to become due under this chapter from the car company which made the erroneous payment or shall be refunded to such car company by the department. A claim for refund or credit that has not been filed with the department within three years after the tax payment upon which a refund or credit is claimed became due or one year after such tax payment was made, whichever time is the later, shall not be allowed by the director.

[C79, 81, § 435.7]

435.8 Statutes applicable to tax.

All the provisions of sections 422.26 and 422.28 to 422.30, consistent with the provisions of this chapter, shall be applicable to car companies subject to the tax imposed under section 435.2

[C79, 81, § 435.8]

435.9 Credit of tax to special fund.

For the fiscal years beginning on or after July 1, 1983, the net proceeds of the tax imposed by section 435.2 and penalties collected under this chapter shall be credited to the special railroad facility fund established in section 307B.23 and any refunds made pursuant to this chapter shall be made from this fund. However, for each fiscal year of the fiscal biennium beginning July 1, 1981 and ending June 30, 1983, the total of the net proceeds of the tax imposed by section 435.2 and penalties collected under this chapter in excess of one million fifty thousand dollars collected in the fiscal year beginning July 1, 1981 and in excess of one million one hundred forty thousand dollars collected in the fiscal year beginning July 1, 1982 shall be credited to the special railroad facility fund.

[81 Acts 2d Ex, ch 3, § 20]

Referred to in § 307B.23